Tentative Rulings for November 1, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CEC02694 ***In Re: Marvin Benitez*** **(Dept. 501)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

15CECG03720 ***Porter v. CRMC*** **is continued to Tuesday, December 6, 2016 at 3:30 p.m. in Dept. 503.**

16CECG01874 ***Flanigan v. Western Milling, LLC*** **is continued to Tuesday, November 22, 2016, at 3:30 p.m. in Dept. 501.**

16CECG01846 ***MUFG Union Bank v. Mahal*** **is continued to Tuesday, November 8, 2016 at 3:30 p.m. in Dept. 402**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(20) **Tentative Ruling**

Re: ***Lekaj v. Simonian et al.***
Superior Court Case No. 15CECG02874

Hearing Date **November 1, 2016 (Dept. 402)**

Motion: Defendants Peter Simonian and Simonian Sports Medicine Clinic's Motion for Summary Judgment

Tentative Ruling:

To grant and set aside the September 20, 2016 order granting summary judgment. (Code Civ. Proc. §§ 437c(h), 473(b).) The hearing on the motion for summary judgment will be set for November 23, 2016 at 3:30 p.m. in Department 402. Opposition and reply papers due per Code of Civil Procedure.

Explanation:

While plaintiff's counsel was out of the country attending to his parents and their urgent medical needs, counsel's office failed to timely submit a timely request to continue the September 20, 2016 motion for summary judgment. Though the motion for relief blames the court instead of counsel appropriately taking responsibility for failures to timely file documents or request oral argument, the court will grant the motion with the understanding that counsel's mistakes were due to the fact that counsel was out of the office on a medical emergency. The court will therefore treat this as a case of surprise or excusable neglect, and exercise its broad discretion to grant relief under Code Civ. Proc. § 473(b). (See *Elston v. City of Turlock* (1985) 38 Cal.3d 227, 233 ["Very slight evidence will be required to justify a court in setting aside the default."])

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/31/16
(Judge's initials) (Date)

(29)

Tentative Ruling

Re: ***Kristina Ash v. S45, Inc., et al.***
Court Case No. 16CECG02685

Hearing Date: November 1, 2016 (Dept. 402)

Motion: Defendants S45, Inc., dba The Suspension Source, and KW Automotive North America's demurrer to Plaintiff's first, second, third, twelfth and fourteenth causes of action

Tentative Ruling:

The Court notes Plaintiff's first amended complaint, filed October 27, 2016; however, such filing was improper. (Code Civ. Proc. §§ 472(a), 1005(b).) Accordingly, the Court strikes, *sua sponte*, Plaintiff's first amended complaint and rules on the complaint as follows:

To sustain the demurrers to Plaintiff's first, second, third and fourteenth causes of action, with leave to amend. To sustain the demurrer to Plaintiff's twelfth cause of action, without leave to amend.

Explanation:
First cause of action - Hostile Work Environment based on Medical Condition (against all defendants)

The elements of a hostile environment claim under the Fair Employment and Housing Act ("FEHA") are: (1) plaintiff belongs to a protected group; (2) plaintiff was subjected to unwelcome harassment because of being a member of that group; and (3) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. (*Aguilar v. Avis Rent A Car System, Inc*. (1999) 21 Cal.4th 121, 130; see also *Muller v. Automobile Club of So. Calif*. (1998) 61 Cal.App.4th 431, disapproved on other grounds in *Colmenares v. Braemar Country Club, Inc*. (2003) 29 Cal.4th 1019.) The plaintiff must show a "concerted pattern of harassment of a repeated, routine or a generalized nature." (*Id*. at p. 446)

In the case at bench, Plaintiff alleges violation of Government Code section 12940(j)(1); specifically, that Defendants harassed Plaintiff based on her medical condition, creating a hostile/abusive working environment. Plaintiff fails to plead the elements of the cause of action or provide any facts in support of her allegations. The demurrer to Plaintiff's first cause of action is sustained, with leave to amend.

Second cause of action - Disability/Medical Condition Discrimination (against Defendants KW, S45, and Does 1-20)

To allege a cause of action for disability discrimination in violation of FEHA, a plaintiff must show he or she: (1) suffers from a disability; (2) is a qualified individual; and (3) was subjected to an adverse employment action because of the disability. (*Prue v. Brady Company/San Diego, Inc*. (2015) 242 Cal.App.4th 1367.) Plaintiff must also show that defendant knew of plaintiff's disability at the time defendant made the adverse employment decision. (*Id*.)

Plaintiff alleges that Defendants failed to accommodate Plaintiff's "condition" and terminated Plaintiff because of her sexual orientation and/or because of her condition. However, Plaintiff provides no *facts* in support of these allegations. Accordingly, Defendants' demurrer to the second cause of action is sustained, with leave to amend.

Third cause of action - Failure to Engage in Interactive Process (against Defendants KW, S45, and Does 1-20)

FEHA requires an employer to engage in a good faith interactive process with a disabled employee to determine whether reasonable accommodation of the employee's disability is possible. (Gov. Code §12940(n); see *Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1195.) "To prevail on a claim for failure to engage in the interactive process, the employee must identify a reasonable accommodation that would have been available at the time the interactive process occurred. [Citations.]" (*Nealy v. City of Santa Monica* (2015) 234 Cal.App.4th 359, 379.) The employee must "initiate the process unless the disability and its resulting limitations are obvious." (*Scotch v. Art Institute of California-Orange County* (2009) 173 Cal.App.4th 986, 1013.)

Here, Plaintiff simply states that Defendants failed to engage Plaintiff in a timely good-faith interactive process to identify reasonable accommodations for Plaintiff's disability, in violation of Government Code section 12940(m). Plaintiff fails once more to provide any facts. Defendants' demurrer to the third cause of action is sustained, with leave to amend.

Twelfth cause of action - Violation of Civ. Code §§ 51.7 and 52/Unruh Act (against all Defendants)

The Unruh Civil Rights Act "has no application to employment discrimination." (*Rojo v. Kliger* (1990) 52 Cal.3d 65, 77, citing *Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 493, 500.) Though the Act is to be liberally construed, its scope is limited to discrimination made by a business establishment in the course of furnishing goods, services or facilities to its clients, patrons or customers. (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1449; see *Alcorn*, supra, 2 Cal.3d at p. 500.)

As Plaintiff's entire complaint is based on discrimination in the employment context and the California Supreme Court has expressly held that the Unruh Act does not apply to employment discrimination, Defendants' demurrer to Plaintiff's twelfth cause of action is sustained, without leave to amend.

Fourteenth COA - Retaliation (against employer Defendants)

Labor Code section 1102.5 is a "whistleblower" protection statute, aimed at providing protection to employees who report illegal conduct in the workplace. In a whistleblower retaliation claim, plaintiff must show he or she engaged in protected activity, the employer subjected him or her to an adverse employment action, and that there was a causal link between the two. (Lab. Code §1102.5(b); *Hager v. County of Los Angeles* (2014) 228 Cal.App.4th 1538, 1540.)

Here, Plaintiff alleges that Defendants retaliated against Plaintiff "because of Plaintiffs opposition to practices forbidden under [FEHA] and because of Plaintiff's complaints to a person with authority over the employee or another employee who has the authority to investigate, discover, or correct the violation or noncompliance." (Compl. ¶81.) Plaintiff's allegations fall short as, once more, Plaintiff fails to provide facts in support of her cause of action. Defendants' demurrer to the fourteenth cause of action is thus sustained, with leave to amend.

Request for Judicial Notice:

Judicial notice is taken as requested by Defendants.

Pursuant to California Rules of Court, rule 3.1312, and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 10/31/16
(Judge's initials) (Date)

Tentative Rulings for Department 403

(19) **Tentative Ruling**

Re: ***Capriola v. Express Services, Inc.***
Court Case No. 15CECG02741

Hearing Date: November 1, 2016 (Department 403)

Motion: By plaintiff to seal declaration of Greg Lander filed August 15, 2016.

Tentative Ruling:

To grant. Plaintiff is to provide an envelope with the Court's order described in California Rules of Court, Rule 2.551.

Explanation:

California Rules of Court, Rule 1.20(b) requires that social security numbers be kept confidential. Civil Code section 1798.85 forbids dissemination of a social security number to the general public. Civil Code section 1798.86 prohibits a waiver of such confidentiality. 42 USC section 402(c)(2)(C)(viii)(I) also requires such numbers be accorded confidentiality. See also *Copley Press, Inc. v. Superior Court* (1991) 228 Cal. App. 3d 77, 80-81, *Teamsters Local 856 v. Priceless, LLC* (2003) 112 Cal. App. 4th 1500, 1512-1513, and *Sherman v. U.S. Department of the Army* (5th Cir. 2001) 244 F. 3d 357, all holding such numbers are to be kept confidential.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/31/16
(Judge's initials) (Date)

(2)

Tentative Ruling

Re: ***Benavides et al. v. Xiong et al.***
Superior Court Number: 16CECG01731

Hearing Date: November 1, 2016 (Dept. 403)

Motion: Petitions to Compromise Minors' Claim

Tentative Ruling:

To grant. Orders signed. Hearing off calendar.

The court notes that in the future if 2 petitions are being submitted 2 motion slots should be reserved.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/31/16
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: ***Espinosa v. Cosco Home & Office Products, et al.***

Case No. 16CECG01221

Hearing Date: November 1, 2016

Motion: By Defendant Dorel Home Furnishings, Inc. (improperly sued as Cosco Home & Office Products) Demurring to Plaintiff's First Amended Complaint.

Tentative Ruling:

To overrule the demurrer. Defendant has ten (10) days from the date of service of this order in which to respond to the First Amended Complaint.

Explanation:

A general demurrer admits the truth of all material allegations and a Court will "give the complaint a reasonable interpretation by reading it as a whole and all its parts in their context." (*People ex re. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 300.) The standard of pleading is very liberal and a plaintiff need only plead "ultimate facts." (*Perkins v. Superior Court* (1981) 117 Cal.App.3d 1, 6.) However, a plaintiff must still plead facts giving some indication of the nature, source, and extent of the cause of action. (*Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

When pleading the discovery rule as an excuse for the apparently late filing of a complaint, the burden of pleading and proving recourse to the discovery rule rests on the plaintiff. (*Czajkowski v. Haskell & White, LLP* (2012) 208 Cal.App.4th 166, 174.)

Here, Defendant contends that the First Amended Complaint is barred by the statute of limitations, and that the statute is not tolled by the discovery rule.

Plaintiff alleges that he was injured in 2011 when he inflated one of Defendant's hand trucks with an air compressor. He states that he reasonably believed that his own negligence was the cause of the accident until he was informed that the hand truck in question was subject to a recall because of inflation issues. This did not occur until March of 2015.

The parties do not contest that the applicable statute of limitations is Code of Civil Procedure §335.1, which is two years for the negligence of another. Therefore, because the injury occurred in 2011, unless the limitations period is tolled, or the action somehow did not accrue in 2011, the case is untimely.

As Plaintiff has noted, under the discovery rule "the statute of limitations begins to run when the plaintiff suspects or should suspect that [their] injury was caused by

wrongdoing, that someone has done something to [them]." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110-1111.) The question is whether the plaintiff has notice or information of circumstances that would put a reasonable person on inquiry notice about their rights. (*Id.*)

Here, under the liberal pleading standards inherent in a demurrer, Plaintiff has alleged the factual basis for why he was not on inquiry notice with respect to the source of his injury; he inflated the tire, had not checked the pressure while doing so, and assumed that he was the source of the subsequent explosion.

Defendant contends that this is insufficient insofar as it is plaintiff's burden to establish facts "showing that he was not negligent in failing to make the discovery sooner and that he had not actual or presumptive knowledge of facts sufficient to put him on inquiry." (*Czajkowski, supra,* 208 Cal.App.4th at 174.) However, Plaintiff has pleaded the basis for his belief in his own negligence and has therefore pleaded a factual basis by which it would be reasonable for a person not to inquire any further. Whether it was actually reasonable will be for a jury to decide.

Defendant attempts to distinguish *Clark v. Baxter Healthcare Corporation* (2000) 83 Cal.App.4th 1048, 1051, upon which Plaintiff relies, on the grounds that the causation of the plaintiff's injury was so unclear and that plaintiff had conducted her own thorough investigation to determine the cause. (*Id.*) However, *Clark* involved the question of testing the statute of limitations defense on a summary judgment motion, not a demurrer. (*Id.* at 1053-54.) Furthermore, here, Plaintiff has alleged an explanation for the lack of an expansive investigation. Finally, even in *Clark*, the Court noted that the test was that "a plaintiff, under a reasonable person standard, need only suspect a factual basis for the elements of her cause of action in order to discover its existence." (*Id.* at 1060.) Plaintiff has alleged facts to support his argument that a reasonable person would not have suspected the existence of a factual cause other than his own negligence until the notice of recall was issued in 2015.

Because Plaintiff has adequately alleged a basis that a reasonable person would not have had the required information as to the possible source of the injury to plaintiff, the claim may not have accrued until 2015. As a result, the Demurrer is overruled.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/31/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: **David Rodriguez v. Thomas David Nunes**
Superior Court Case No. 15 CECG 03382

Hearing Date: November 1, 2016 **(Dept. 403)**

Application: Default Judgment

Tentative Ruling:

To deny the application without prejudice.

Explanation:

On or about May 23, 2014, while working as a Probation Officer for the County of Fresno, Plaintiff David Rodriguez was assigned to work as security during a car show being held at Sanger Union High School in Sanger, CA. Plaintiff heard a call over his radio seeking assistance and responded to the School Office. A campus security guard was wrestling with Defendant Nunes. Rodriguez assisted in handcuffing him. Nunes complained that his handcuffs were too tight. While Rodriguez's attention was focused on loosening the cuffs, Nunes "head butted" the Plaintiff. Rodriguez suffered serious injuries in the form of a broken nose and broken teeth. At the time of the incident, Nunes was 18 years of age. He was arrested and charged with various felony counts of battery and resisting an executive officer.

Plaintiff filed a judicial form Complaint on October 29, 2015 alleging a cause of action for general negligence and a cause of action for "intentional" tort. The Defendant was personally served at 1225 M Street Fresno CA on January 14, 2016. See proof of service filed on February 5, 2016. This is the address for the Fresno County Jail. Default was entered on February 29, 2016. On October 4, 2016, Plaintiff filed a request for a court judgment along with supporting documents.

However, as a matter of law, a default judgment cannot be entered against an indigent incarcerated defendant who is not represented by counsel. [*Payne v. Superior Court* (1976) 17 C.3d 908, 926.] The incident in question led to a criminal prosection against Mr. Nunes. See Fresno County Superior Court Case No. F1405137. Mr. Nunes was represented by the Public Defender in this matter. Typically, only indigent defendants are represented by the Public Defender's Office. Therefore, the application will be denied without prejudice. If counsel requests, the Court will stay the action pending the release of the defendant. [CCP § 128 (a)(8)]

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The

minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/31/16
(Judge's initials) (Date)

(17) **Tentative Ruling**

Re: ***Heflebower v. Desrosiers et al.***
Court Case No. 14 CECG 01418

Hearing Date: November 1, 2016 (Dept. 403)

Motion: Plaintiff's Motion to Tax Costs

Tentative Ruling:

To grant and to tax Mr. Plotkin's costs in the amount of $6,577.58.

Explanation:

The "very essence" of section 998 is its encouragement of settlement. (*Scott Co. of California v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114; *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 950.) Thus, "to encourage both the making and the acceptance of reasonable settlement offers, a losing defendant whose settlement offer exceeds the judgment is treated for purposes of postoffer costs as if it were the prevailing party." (*Scott Co. v. Blount, Inc., supra*, 20 Cal.4th at p. 1114.)

Plaintiff claims that defendant is 1) not entitled to costs because he made only a token offer which was not made in good faith; and 2) he also challenges several of the expert fee charges as improper or excessive.

Good Faith of the Offer

"The purpose of section 998 is to encourage the settlement of litigation without trial. [Citation.] To effectuate the purpose of the statute, a section 998 offer must be made in good faith to be valid. [Citation.] Good faith requires that the pretrial offer of settlement be 'realistically reasonable under the circumstances of the particular case....' [Citation.] The offer 'must carry with it some reasonable prospect of acceptance. [Citation.]' [Citation.]" (*Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262.)

Whether the offer is reasonable "depends upon the information available to the parties as of the date the offer was served." (*Westamercia Bank v. MBG Industries, Inc.* (2007) 158 Cal.App.4th 109, 130.) Reasonableness generally "is measured, first, by determining whether the offer represents a reasonable prediction of the amount of money, if any, defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant," and "[i]f an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is

reasonable." (*Elrod v. Oregon Cummins Diesel, Inc*. (1987) 195 Cal.App.3d 692, 699, italics and fn. omitted.)

First Test:

The offer easily passes the first test. "Where ... the offeror obtains a judgment more favorable than its offer, the judgment constitutes prima facie evidence showing the offer was reasonable and the offeror is eligible for costs as specified in section 998." (*Santantonio v. Westinghouse Broadcasting Co*. (1994) 25 Cal.App.4th 102, 117 (*Santantonio*).)

Second Test:

"If the offer is found reasonable by the first test, it must then satisfy a second test: whether defendant's information was known or reasonably should have been known to plaintiff. This second test is necessary because the section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer." (*Elrod v. Oregon Cummins Diesel, Inc*., *supra*, 195 Cal.App.3d at p. 699.)

Plaintiff argues that the $100,001 offer was a "token offer." Specifically, plaintiff points to the facts that he was seeking over two million dollars in damages, had invested more than $100,001 in the costs in the case by the time of the offer, and "there was little to no evidence that plaintiff did not have substantial injuries that would greatly exceed $100,000," i.e., medical specials would almost certainly exceed $100,001. Moreover, "defendant had ample evidence of negligent conduct by defendant and put all of their hopes on a complicated legal defense theory which admits the action and yet claims no responsibility," i.e., assumption of the risk. Thus, plaintiff argues, "no reasonable possibility existed that plaintiff would walk away from his case, the costs involved, and dismiss uncontroverted claims of negligence against defendant on a legal theory."

Nevertheless, cases finding offer "token offers" made in bad faith are far lower than $100,001. (See *Pineda v. Los Angeles Turf Club, Inc*. (1980) 112 Cal.App.3d 53 (*Pineda*) [$2,500 offer]; *Wear v. Calderon* (1981) 121 Cal.App.3d 818 (*Wear*) [$1]; *Culbertson v. R.D. Werner Co., Inc*. (1987) 190 Cal.App.3d 704 [$5,000]; *Elrod v. Oregon Cummins Diesel, Inc*., supra, 195 Cal.App.3d 692 [$15,001].) Plaintiff cites W*ear*, *supra*, 121 Cal.App.3d 818 and *Pineda*, *supra*, (1980) 112 Cal.App.3d 53. *Wear* and *Pineda* are credited with establishing the requirement that a section 998 settlement offer must be reasonable and in good faith to support an award of expert witness fees. In applying these general principles, however, subsequent cases have repeatedly emphasized the specific facts in each case may lead to a different conclusion. (See, e.g., *Essex Ins. Co. v. Heck* (2010) 186 Cal. App. 4th 1513, 1529; *People ex rel. Lockyer v. Fremont General Corp.* (2001) 89 Cal.App.4th 1260, 1272–1273; Jones, supra, 63 Cal.App.4th at p. 1263; *Culbertson v. R.D. Werner Co., Inc*., *supra*, 190 Cal.App.3d 704, 708–710 .) Similarly, the facts here are readily distinguishable from those in *Wear* and *Pineda*.

In *Wear*, the Court of Appeal reversed an award of expert witness fees because it found a nominal $1 settlement offer lacked good faith when compared to the plaintiff's $18,500 in damages. (*Wear*, supra, 121 Cal.App.3d at p. 821.) In *Pineda*, the Court of Appeal affirmed the trial court's conclusion a $2,500 settlement offer was a token offer when compared to the $10 million the plaintiffs sought. (*Pineda*, supra, 112 Cal.App.3d at pp. 62–63.) Both courts stressed that they based their decision on "the circumstances of the particular case." (*Wear*, at p. 821; *Pineda*, at p. 63.)

However, in *Santantonio*, *supra*, (1994) 25 Cal.App.4th 102, the Court of Appeal found the trial court did not abuse its discretion when it awarded expert witness fees based on a $100,000 settlement offer, despite the plaintiff's claim of more than $900,000 in economic damages: "[T]he mere fact that [plaintiff] claimed projected economic losses of over $900,000 does not mean that defendants' $100,000 offer was unreasonable or unrealistic. Defendants contended that they had no liability to [plaintiff] at all, and the jury ultimately agreed. Moreover, defendants contended that the damage estimates by plaintiffs' expert were greatly excessive...." (*Id*. at p. 118.) *Santantonio* is readily analogous to this case.

Even a token offer may be found to be made in good faith and entitle a defendant to discretionary expert fees. *Adams v. Ford Motor Co*. (2011) 199 Cal.App.4th 1475 (Adams) is instructive. There, the defendant made a section 998 settlement offer of $10,000 and a mutual waiver of costs, which the plaintiffs rejected. After the jury returned a verdict in favor of the defendant, the defendant sought $167,570 in expert witness fees pursuant to section 998. The trial court denied the plaintiffs' motion to tax costs, and the appellate court affirmed. (*Id*. at p. 1484.) The court rejected the plaintiffs' argument the $10,000 offer was unreasonable "in light of the hundreds of thousands of dollars in costs, and $2 million in damages" they sought. (*Id*. at p. 1485.) The court reasoned that the offer "could not be evaluated simply in comparison to the judgment [they] sought, but it should have been measured in light of the likelihood that [they] would prevail at trial." (*Id*. at pp. 1485–1486.)

Plaintiff makes exactly the same argument as the plaintiffs in *Adams*: he had too much invested in the case and his damages were too high. He also makes the same mistake as the *Adams* plaintiffs, he fails to provide a reasoned analysis of his prospects for success based on what he knew at the time of the 998 offer. The issue is not whether plaintiff would "walk away from his case," but whether the plaintiff could appreciate that the offer represented a realistic outcome at trial.

Defendant has established that at the time the 998 offer was made, fact discovery had been completed. He has also pointed to deposition testimony that tended to establish that plaintiff knew a baseball game was on going and was participating in it. The court recalls the voluminous evidence presented on Defendant's motion for summary judgment, which was filed and served in March of 2015, nearly two months before the May 1, 2015 998 offer. The evidence on whether plaintiff assumed the risk of injury was very close and would depend on an assessment of the credibility of the individual witnesses. As such, the issue had to be submitted to a jury. Based on plaintiff's awareness of this deposition testimony plaintiff had to know that the issue of assumption of the risk was not just an esoteric legal theory, it was a real obstacle to

plaintiff proving liability. Plaintiff would have been aware that assumption of the risk was going to be raised as a defense because before the 998 offer was served, both due to the summary judgment motion and because the parties went to mediation at which time matters of liability were discussed. (McCarthy Decl. ¶ 24.)

Defendant also has shown that the offer was in the ballpark for medical special damages. While plaintiff's past medical expenses were in the $60,000 range, prior to the 998 offer, defendant had subpoenaed medical records from plaintiff's providers that indicated his future care could be limited to orthodontia alone at a cost of only $8,000 to $10,980. (McCarthy Decl., Ex. K.)

Defendants has demonstrated that plaintiff had a basis on which to judge the objective reasonableness of the offer. And objectively the offer was reasonable. The court will award expert fees.

Economic Disparity of the Parties:

Citing the dissenting opinion in *Santantonio*, *supra*, (1994) 25 Cal.App.4th 102, 127-128, plaintiff claims that "unless trial courts include economic disparity amongst the parties in setting the costs to be shifted under section 998, they will distort settlement incentives and unduly discourage individual litigants from pursuing reasonable courses of action in the courts." A dissent is not binding legal authority. There is no requirement that this be done. Section 998 simply provides for the court to exercise its discretion: "if an offer made by a defendant is not accepted and the plaintiff fails to obtain a more favorable judgment or award, … the court … in its discretion, may require the plaintiff to pay a reasonable sum to cover postoffer costs of the services of expert witnesses…" (Code Civ. Proc., § 998, subdivision (c)(1).)

Specific Expert Fees:

A. Motion to Tax — Generally

Items of allowable costs are set forth in Code of Civil Procedure section 1033.5, subdivision (a), and disallowed costs are set forth in subdivision (b). Items not expressly mentioned in the statute "upon application may be allowed or denied in the court's discretion." (Code Civ. Proc. § 1033.5, subd. (c)(4).) All allowable costs must be reasonably necessary to the conduct of the litigation rather than merely convenient or beneficial to its preparation, and they must be reasonable in amount and actually incurred. (Code Civ. Proc. § 1033.5, subd. (c)(1), (2) and (3).)

On motion to tax costs, the initial burden depends on the nature of the costs that are being challenged. "If the items appearing in a cost bill appear to be proper charges, the burden is on the party seeking to tax costs to show that they were not reasonable or necessary. On the other hand, if the items are properly objected to, they are put in issue and the burden of proof is on the party claiming them as costs." (*Ladas v. Calif. State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774.) "The court's first determination, therefore, is whether the statute expressly allows the particular item, and whether it appears proper on its face. If so, the burden is on the objecting party to

show them to be unnecessary or unreasonable." (*Ibid*.) In order to meet this burden, where the objections are based on factual matters, the motion should be supported by a declaration. (*County of Kern v. Ginn* (1983) 146 Cal.App.3d 1107, 1113-4.)

B. Dan Girvan

Plaintiff contends that because Mr. Girvan did not testify at trial, and especially because Judge Black would have prevented him from offering two of his three opinions at the second trial, his fees were not "reasonably necessary" and "not helpful in assisting the trier of fact." First, a non-testifying expert's time may be recovered because section 998 allows for the recovery of expert witnesses "actually incurred and reasonably necessary in ... preparation for trial" are recoverable. (Code Civ. Proc., § 998, subd. (c)(1).) Thus, there is no merit in plaintiff's contention that an expert witness's testimony must be helpful to the trier of fact. Second, a new trial order after a mistrial places the parties in the same position as if they had never tried the case. The parties have the right "to introduce additional or new evidence not introduced at the earlier trial." (*Gordon v. Nissan Motor Co., Ltd*. (2009) 170 Cal.App.4th 1103, 1111-1113.) Judge Black's evidentiary ruling was of no consequence to the third trial. Moreover, this court denied plaintiff's motion in limine to exclude his testimony. (McCarthy Decl. ¶ 15.) The defense ultimately decided not to call Girvan in a tactical decision made during trial. (McCarthy Decl. ¶ 17.) Thus, it can be said, his services were "reasonably necessary" for "the preparation of trial." The court allows the full $23,848.28 in fees.

C. Peter C. Cassini, M.D.

Dr. Cassini was the doctor who performed an IME on Plaintiff. However the defense withdrew Dr. Cassini as a retained expert and he remained a "consultant." Plaintiff contends, because of this, the cost of his expert services are not recoverable. Section 998 states that fees for expert witnesses "actually incurred and reasonably necessary in ... preparation for trial" are recoverable. (§ 998, subd. (c)(1).) Although the statute refers to expert witnesses, courts have recognized that "section 998 ... covers the cost of experts who aid in the preparation of the case for trial, even if they do not actually testify." (*Santantonio v. Westinghouse Broadcasting Co.*, *supra*, 25 Cal.App.4th at p. 124.) The court allows Dr. Cassini's consultant's fees of $8,268.75.

D. Harry Plotkin

Mr. Plotkin was the defense jury consultant. California Code of Civil Procedure, section 1033.5(b)(4) provides, "the following items are not allowable as costs, except when expressly authorized by law. . . Costs in investigation of jurors or in preparation for voir dire. His fees are not recoverable, and defendant withdraws his request for Mr. Plotkin's fees.

Accordingly, the court taxes Mr. Plotkin's fees in the amount of $6,577.58.

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 10/31/16
(Judge's initials) (Date)

Tentative Rulings for Department 501

(20) **Tentative Ruling**

Re: ***Rocha v. City of Fresno***, Superior Court Case No. 16CECG02934

Hearing Date: **November 1, 2016 (Dept. 501)**

Motion: Application for Permission to Present Late Claim

Tentative Ruling:

To deny.

Explanation:

Petitioner's cause of action accrued on 7/25/14, and he was incarcerated from that date until 11/24/15. On 2/19/16 petitioner's counsel filed a claim for damages against the City of Fresno. On 3/15/16 the City denied petitioner's application for leave to present a late claim.

Government Code § 911.2 requires that a claim relating to a cause of action for death or personal injury be presented to the public entity within 6-months after accrual of the cause of action. Section 911.4(a) provides that when the injured party fails to file a timely claim, a "written application may be made to the public entity for leave to present such claim."

The court can only grant relief to present a late claim if the application was made within a reasonable time *not to exceed one year* from the actual date of the cause of action. (Gov. Code § 911.4(b).) Petitioner clearly went well past one year. When the application to file a late claim was not itself timely filed, neither the public entity nor the court has jurisdiction to grant relief. (See *Kagy v. Napa State Hosp.* (1994) 28 Cal.App.4th 1, 2-3.)

Code of Civil Procedure § 352.1(a) provides that incarceration of a plaintiff tolls the statute of *limitations* until released from prison, or for two years. Petitioner contends that the statute should begin to run on 11/25/15 when he was released from prison. However, section 352.1(b) states that "[t]his section does not apply to an action against a public entity or public employee upon a cause of action for which a claim is required to be presented …" Thus, petitioner's incarceration cannot serve as a basis for relief from filing a late claim.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will

serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling

Issued By: MWS on 10/31/16

(Judge's initials) (Date)

(30)

Tentative Ruling

Re: ***Dustin Callison v. Corizon Health, Inc.***

Superior Court No. 16CECG01663

Hearing Date: Tuesday, November 1, 2016 (**Dept. 501**)

Motion: (1) Defendants' Demurrer
(2) Defendants' Motion to Strike

Tentative Ruling:

DEMURRER
To **Sustain** demurrer to first claim regarding civil code section 52.4.
To **Sustain** demurrer to first claim regarding civil code section 54.
To **Overrule** all other bases for demurrer regarding first claim.
To **Sustain** demurrer to third claim regarding EADACA for failure to establish "care or custody."
To **Sustain** demurrer to third claim regarding civil code section 54.
To **Overrule** all other bases for demurrer regarding third claim.

MOTION TO STRIKE
To **Grant** request 1 *in part* because Defendants Fresno County Department of Public Health and Sherriff's Department are immune to punitive damages.
To **Grant** requests: 4, 5, 7, 9, and 10.
To **Order** requests 2 and 11 off calendar.
To **Deny** all other requests.

To Grant Plaintiff 20 days leave to amend. (Cal. Rules of Court, rule 3.1320(g).)

Explanation:

DEMURRER

1. "Personal Injuries - Against Public Entity And Employees" (First Claim), against the County, Sheriff Mims and Mr. Pomaville, does not state facts sufficient to constitute a cause of action.

A public entity is liable for injuries proximately caused by an act or omission of an employee of the public entity within the scope of his or her employment if the act or omission would otherwise have given rise to a cause of action against the employee or his or her personal representative. (Govt. Code § 815.2.) Here, Government Code section 845.6 creates such a cause of action because when there is actual or constructive knowledge of a need for immediate medical care, a duty of reasonable action to summon medical care is created. (Govt. Code § 845.6; *Lawson v. Superior Court* (2010) 180 Cal.App.4th 1372; *Watson v. State of California* (1993) 21 Cal.App.4th

836, 841; *Johnson v. County of Los Angeles* (1983) 143 Cal.App.3d 298, 317; *Hart v. County of Orange* (1967) 254 Cal.App.2d 302, 307.)

Here, Plaintiff alleges that he filed several complaints and grievances against Defendants Thomas and Corizon. (Complaint, ¶ 22, 24.) Therefore, Defendants Pomaville and Mims had reason to know of Plaintiff's urgent needs but consciously failed to act. These allegations state a cause of action under Government Code section 845.6. Plaintiff satisfies Government Code section 815.2 in pleading that Defendants Pomaville and Mims were employed by Defendants Fresno County Department of Public Health and Fresno County Sheriff's Department. (Complaint, ¶¶ 5, 7.) Demurrer overruled.

Conclusory allegations
Complaints must plead material facts. (Code Civ. Proc., § 425.10.) If material facts are pleaded in an improper manner, e.g., as conclusions of law, or by evidentiary recitals, argument, or inference, or in the alternative, the facts thus improperly pleaded may be disregarded and the pleading will be fatally defective. The defect may be reached by general demurrer. (*McCaughey v. Schuette* (1897) 117 Cal. 223; *Metropolis Trust & Savings Bank v. Monnier* (1915) 169 Cal. 592, 596; *Clement v. Dunn* (1931) 114 Cal.App. 60, 63; *Thompson v. Purdy* (1931) 117 Cal.App. 565, 567; *Foerst v. Hobro* (1932) 125 Cal.App. 476; *Smith v. Bentson* (1932) 127 Cal.App.Supp. 789; *Callaway v. Novotny* (1932) 128 Cal.App. 166, 169; *Sklar v. Franchise Tax Bd.* (1986) 185 Cal.App.3d 616, 621.)

Here, Plaintiff adequately asserts facts to allege a cause of action under Government Code section 815.2 (see above). Demurrer overruled.

Immunities
A general demurrer may lie where plaintiff has included allegations that clearly disclose some defense or bar to recovery (*Cryolife, Inc. v. Sup.Ct.* (2003) 110 Cal.App.4th 1145, 1152; *Casterson v. Sup.Ct. (Cardoso)* (2002) 101 Cal.App.4th 177, 183; *Holiday Matinee, Inc. v. Rambus* (2004) 118 Cal.App.4th 1413, 1421.)

> *Gov't Code section 845.6*
> "Neither a public entity nor a public employee is liable for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner" unless "the employee knows or has reason to know that the prisoner is in need of immediate medical care and he fails to take reasonable action to summon such medical care." (Govt. Code § 845.6.)
>
> Here, Plaintiff alleges that he filed several complaints and grievances against Defendant Thomas. (Complaint, ¶ 22.) Therefore, Defendants Pomaville and Mims had reason to know of Plaintiff's urgent needs but consciously failed to act. Demurrer overruled.
>
> *Gov't Code section 820.2*
> A public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused. (Govt. Code § 820.2.) But

when there is actual or constructive knowledge of a need for immediate medical care, a **duty** of reasonable action to summon medical care is created. (*Johnson, supra,* 143 Cal.App.3d 298 at p. 317, emphasis added; *Hart, supra,* 254 Cal.App.2d 302 at p. 307.)

Here, Defendants Pomaville and Mims had a duty of reasonable action; discretion was not permitted. Demurrer overruled.

Gov't Code section 844.6
"Notwithstanding any other provision of this part, except as provided in this section … a public entity is not liable for… An injury to any prisoner" but "Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission." (Govt. Code § 844.6.)

Here, Plaintiffs alleges that his injuries were due to Defendants Pomaville and Mims' negligence or wrongful acts in failing to provide medical services (see above). Demurrer overruled.

Government Code section 820.8
Section 820.8 applies to the acts or omissions of others; it does not exonerate a public employee from liability for injury proximately caused by his own negligent or wrongful acts or omissions. (Govt. Code § 820.8.)

Here, Plaintiffs alleges that his injuries were due to Defendants Pomaville and Mims' negligence or wrongful acts in failing to provide medical services (see above). Demurrer overruled.

Government Code section 821
Section 821 applies to the adoption of or failure to adopt an enactment. Here, there is no such allegation. Demurrer overruled.

Government Code section 845.2
Section 845.2 applies when a public entity fails to provide a jail with sufficient equipment, personnel or facilities therein. Here, there is no such allegation. Demurrer overruled.

Civil Code section 52.4
Section 52.4 authorizes causes of action by persons "subjected to gender violence." Gender Violence is a form of sex discrimination that includes: (1) conduct that would constitute a criminal offense that has as an element the use or threatened use of force, committed at least in part due to the victim's gender, and (2) a physical intrusion or invasion of a sexual nature under coercive conditions. (Civ. Code § 52.4.)

Here, Plaintiff makes no allegations indicating any gender violence. Demurrer sustained.

Civil Code section 54
Civil Code section 54 is part of the California Disabled Persons Act. It *only* guarantees physical access to a facility; it "afford[s] disabled persons alternative remedies for

discrimination based on architectural barriers to access." (*Flowers v. Prasad* (2015) 238 Cal.App.4th 930, 940; *Wilkins-Jones v. County of Alameda* (N.D. Cal. 2012) 859 F.Supp.2d 1039, 1054 referencing *Madden v. Del Taco, Inc.* (2007) 150 Cal.App.4th 294, 301 and *Anderson v. County of Siskiyou* 2010 WL 3619821, at *6 (N.D. Cal. Sept. 13, 2010); *Turner v. Ass'n of Am. Med. Colleges* (2008) 167 Cal.App.4th 1401, 1412.)

Here, any allegation regarding denial of services is not actionable under the California Disabled Persons act because it only guarantees physical access to a facility. And Plaintiff makes no allegations regarding architectural barriers. Demurrer sustained.

2. "Abuse of Dependent Adult" (Third Claim), against Corizon and Dr. Thomas, does not state facts sufficient to constitute a cause of action.

A. Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA")
To trigger the enhanced remedies for neglect under the EADACPA, a plaintiff must allege more than simple or even gross negligence. (*Carter v. Prime Healthcare Paradise Valley LLC* (2011) 198 Cal.App.4th 396, 406; *Covenant Care Inc v. Superior Court* (2004) 32 Cal.4th 771.) A plaintiff must allege facts establishing that the defendant: (a) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene, or medical care; (b) knew of the conditions that made the elder or dependent adult unable to provide for his or her own basic needs; (c) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult or with conscious disregard of the high probability of the injury (see *Delaney v. Baker* (1999) 20 Cal.4th 23, 31-32 "'[R]ecklesness' refers to a 'deliberate disregard' of the 'high degree of probability' that an injury will occur" and "rises to the level of a 'conscious choice of a course of action ... with knowledge of the serious danger to others involved in it'"); and (d) its denial or withholding of goods or services caused the elder or dependent adult to suffer physical harm, pain, or mental suffering. (*Carter, supra,* 198 Cal.App.4th 396 at p. 406; *Knox v. Dean* (2012) 205 Cal.App.4th 417, 430.) Thus, the enhanced remedies are available only for " 'acts of egregious abuse' against elder and dependent adults." (*Delaney, supra* 20 Cal.4th 23 at p. 35; *Covenant Care, supra,* 32 Cal.4th at p. 786.) "[I]n order to obtain the Act's heightened remedies, a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, supra*, 32 Cal.4th at p. 789.)

Here, Plaintiff alleges the specific nature of his medical condition. He has Guillian-Barre disease, which has caused an inability to swallow and dependence on others to administer his feeding tube. (Complaint, ¶ 19.) Plaintiff also alleges the danger of not providing continued acute care for the condition. He alleges infection and bleeding caused by the use of the push feeding, a non-standard method of care. (Complaint, ¶ 24 (c).) Plaintiff then alleges that any qualified physician would know or should have known that this condition was being treated inappropriately, or that the decisions were intentionally made based on improper motives, in conscious disregard of the risk to the patient's life or health. Plaintiff alleges that his treating physician, Defendant Thomas, refused to address ongoing problems with the feeding tube (Complaint, ¶ 24 (e)), and that even after another doctor ordered gravity feed method (which resolved his issues) (Complaint, ¶ 24(g)), Defendant Thomas later reinstated the non-standard push feeding

method. (Complaint, ¶ 24(h).) Plaintiff alleges Defendant Thomas' decisions were retaliatory based on his participation in an investigation regarding her services. (Complaint, ¶ 23.)

B. Absence of particularized allegations showing plaintiff was a dependent adult
Welfare and Institutions Code section 15610.23 defines "dependent adult" as persons who have physical or mental limitations that restrict his or her ability to carry out normal activities.

Here, Plaintiff alleges that he has Guillian-Barre disease, which has caused an inability to swallow and dependence on others to administer his feeding tube. (Complaint, ¶ 19.) This makes Plaintiff a dependent adult because he cannot feed himself, which is a normal activity. Demurrer overruled.

C. Absence of particularized allegations showing "Oppression, Fraud, Or Malice.
To adequately assert Elder Abuse, "a plaintiff must allege conduct essentially equivalent to conduct that would support recovery of punitive damages." (*Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771, 789; Welf. & Inst. Code §§ 15600 et seq.)

Here, Defendant argues that Plaintiffs have not plead "Oppression, Fraud, Or Malice" justifying punitive damages. (Demurrer, filed 9/21/16 p5 ¶ C.) However, a *separate* showing of oppression, fraud or malice is not required because punitive damages are supported by an adequate pleading of EADACPA. Demurrer overruled.

D. Absence Of Particularized Allegations Showing Causation
Here, Plaintiff alleges that as a result of Defendant's conduct, he suffered "bleeding, puss, and foul odors." (Complaint, ¶ 27.) He also alleges injuries from his fall (Complaint, ¶ 24 (f)), "permanent disability" and "general damages." (Complaint, ¶ 38.) These allegations are sufficient. Demurrer overruled.

E. Absence Of Particularized Allegations Showing Dr. Thomas Had "The Care" Of Plaintiff During Each Alleged Instance Of Inadequate Care
In order to plead "care or custody," the plaintiff must plead specific facts showing a party has assumed a significant measure of responsibility for attending to one or more of an elder's ongoing basic needs that an able-bodied and fully competent adult would ordinarily be capable of managing. (*Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148.)

Here, Plaintiff fails to adequately allege "care" or "custody." He alleges that his assigned physician was Defendant Thomas, but he does not assert that she had more than just casual or limited interactions. Demurrer sustained.

F. Absence Of Particularized Facts Showing Corizon "Managing Agent" Malfeasance
Civil Code § 3294(b) provides in part: "With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation." (see also *College Hosp. Inc. v. Super. Ct.* (1994) 8 Cal.4th 704, 726.) Plaintiffs must allege specific facts showing advanced knowledge,

authorization, or ratification on behalf of the corporate employer, **or** make an assertion that an officer, director or managing agent was directly responsible. (*Grieves v. Superior Court* (Fox) (1984) 157 Cal.App.3d 159.)

Here, Plaintiff alleges that he was treated by Defendant Thomas, the Medical Director (Complaint, ¶ 21.) This allegation satisfies Civil Code section 3294 under *Grieves, supra,* 157 Cal.App.3d 159. Demurrer overruled.

G. Plaintiffs Allusions To Civil Codes §§ 52.1 and 54 Cannot Salvage His Putative Claim
- Civil Code section 52.1
California's Bane Act, codified at Civil Code sections 52.1(a) and (b), provides a private right of action for damages against any person, whether acting under color of law or not, who interferes or attempts to interfere "by threats, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws" of California.

Here, Plaintiffs adequately assert a Bane Act claim. Plaintiff asserts that Defendants Corizon and Thomas' policies violated his right to adequate medical care as secured by the Eighth and Fourteenth Amendment and the analogous prohibition against cruel and unusual punishment found in Article 1, Section 17 of the California Constitution. (*Estelle v. Gamble* (1976) 429 U.S. 97, 101; *Jett v. Penner* (9th Cir. 2006) 439 F.3d 1091, 1096.) And Plaintiff alleges punishment for requesting medical services (Complaint, ¶¶ 24 (b), 24(f)), which satisfies the "threats, intimidation, or coercion" element. (*Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 961.) Demurrer overruled.

- Civil Code section 54
See above. Demurrer sustained.

MOTION TO STRIKE

1. Complaint, p 8 ln 12 *Punitive Damages*

a. The County is Immune to Punitive Damages
Punitive damages are not recoverable against a public entity. (Gov. Code § 818.)

Here, Plaintiff prays for punitive damages "against defendants" (Complaint, p8 ln12), but it is clear that they apply to cause of action three *only*, which is alleged against Defendants Thomas and Corizon, neither of which are public entitles. (see Complaint, p 6 ln9, p 7 ln 8, and p8 ln 8.) Motion denied.

b. Code of Civil Procedure §425.13
"The purpose of the [Elder Abuse Act was] essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker (1999)* 20 Cal.4th 23, 33.) To this end, the Legislature added to the Act heightened civil remedies for egregious elder abuse, seeking thereby "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." (Welf. & Inst. Code, § 15600,

subd. (j).) To burden such causes with section 425.13's procedural requirements when claims are made for punitive damages would undermine the Legislature's intent to foster such actions by providing litigants and attorneys with incentives to bring them. (*Covenant Care, Inc. v. Super. Ct.* (2004) 32 Cal.4th 771.) Therefore, section 425.13's limitations on actions for damages arising out of professional negligence do not apply to those who pursue the cause of abused elderly persons under the Elder Abuse Act. (*Id.* at p. 790.)

Here, Plaintiff alleges EADACPA, so compliance with Code of Civil Procedure section 425.13 is not required. Motion denied.

c. Plaintiff has not offered the requisite specific factual allegations showing wrongdoing by a "managing agent."

Here, Plaintiff alleges EADACPA, with factual allegations showing wrongdoing by a "managing agent" (see above). Therefore, in this respect request for punitive damages is supported. Motion denied.

d. As to all defendants, the punitive damages request also is improper because Plaintiff has not offered specific facts showing "oppression, fraud, or malice."

Here, Plaintiff alleges EADACPA, which does not require an *additional* showing of oppression, fraud, or malice (see above). Therefore, this request is improper. Motion denied.

2. Complaint, p 7 ln 10 *Punitive Damages*
Here, demurrer to supporting claim (EADACA) is sustained. Therefore, motion ordered off calendar.

3. Complaint, paragraph 24(f) *Allegations about a slip and fall*
Plaintiff alleges that he was moved to an unsafe cell in retaliation for his requests and complaints. (Complaint, ¶ 24 (f).) These allegations relate to the damages that Plaintiff sustained as a result of Defendants Pomaville and Mims' failure to act. Motion denied.

4. Complaint, p 5 ln 25 *Civ. Code § 52.4*
All references to Civil Code section 52.4 are irrelevant (see above). Motion granted.

5. Complaint, p 5 ln 25 *Civ. Code § 54*
All references to Civil Code section 54 are irrelevant (see above). Motion granted.

6. Complaint, p 6 ln 13 *Civ. Code § 52.1*
Here, Plaintiff adequately alleges violation(s) under Civil Code section 52.1 (see above). Motion denied.

7. Complaint, p 6 ln 13 *Civil Code § 54*
See above. Motion granted.

8. Complaint, p 7 ln 12 *Civ. Code § 52.1*

See above. Motion denied.

9. Complaint, p 7 ln 12 *Civil Code § 54*
See above. Motion granted.

10. Complaint, p 8 ln 14 *Conservator Fees*
Here, no conservator has been appointed. Motion granted.

11. Complaint, p 8 ln 13 *Attorney fees*
Here, demurrer to supporting claim (EADACA) is sustained. Therefore, motion ordered off calendar.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 10/31/16
(Judge's initials) (Date)

Tentative Rulings for Department 502

(6)

Tentative Ruling

Re: ***State of California v. Barley Equities, II, LLC***
Superior Court Case No.: 15CECG01007

Hearing Date: November 1, 2016 (**Dept. 502**)

Motion: By Plaintiff State of California by and through the State Public Works Board for order for possession

Tentative Ruling:

To grant. The Court will execute the proposed order which has been submitted.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/28/16
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Marcos Vallejo v. Michael Gouff***
Superior Court Case No. 15 CECG 02737

Hearing Date: November 1, 2016 **(Dept. 502)**

Motion: By Defendant to compel further responses to Form Interrogatories Set One

Tentative Ruling:

To deny the motion as moot. To deny the request for sanctions pursuant to CCP § 2030.300(d).

Explanation:

On or about February 10, 2106, Defendant propounded and served Form Interrogatories, Set One via mail. On April 13, 2016, Plaintiff served responses via mail. Defendant's counsel deemed the responses to Nos. 10.1(a)-(c) and 20.8(a)—(b) deficient. She sent a "meet and confer" letter on May 19, 2106. The attempt was unsuccessful and counsel filed a request for a PTDC on June 1, 2016.

On August 2, 2016, the Court issued an order giving the Plaintiff's counsel 5 days to file an opposition to the relief demanded in the request. If no opposition was filed within 5 days after service of the Order, permission was given to the Defendant to file and serve a motion to compel further responses. See Order filed on August 2, 2016.

No opposition was filed and on September 23, 2016, Defendant filed and served a motion to compel further responses to Form Interrogatories Nos. 10.1 and 20.8. Opposition was filed on October 24, 2016. It is one day late but in the Court's discretion, it will be considered. CRC Rule 3.1300(d).

The opposition indicates that on July 14, 2016, amended responses to the form interrogatories in question were served by mail. See Declaration of Fourchy at ¶ 2. In addition, these amended responses were re-served on October 4, 2016 in a "meet and confer" letter sent by Mr. Fourchy to Ms. Blake. See Exhibit 3 attached to the Declaration of Fourchy.

The motion is moot. As for sanctions, counsel has not provided any reason as to why the amended responses were not received. Therefore, the request for sanctions will be denied. [CCP § 2030.300(d)]

Pursuant to California Rules of Court, rule 3.1312(a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: DSB on 10/31/16
(Judge's initials) (Date)

Tentative Rulings for Department 503